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PETITION FOR CERTIORARI

No. 538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

HOMER B. POTTS, NICK SENEGAR, AND THE NORTH LITTLE ROCK TRANSPORTATION CO., INC. ..... *Petitioners*

v.

DORIS McCASTLAIN, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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Petitioners pray that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court, entered in the above entitled case on April 11, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas (R. 34), printed in Appendix B hereto, *infra*, p. 13, is reported in 401 S.W. 2d 220.

JURISDICTION

The decision of the Arkansas Supreme Court was entered on April 11, 1966. (R. 34; p. 13, infra.) An application for extension of time in which to file this petition was timely filed and the extension was granted to September 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the validity of a State statute on grounds of repugnancy

to the Constitution of the United States is drawn in question.

QUESTION PRESENTED

Whether Act 42 of the First Extraordinary Session of the 1965 General Assembly of the State of Arkansas sets up an unconstitutional and arbitrary classification which discriminates against the taxicab transportation industry, violative of the guaranties of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

STATUTE INVOLVED

The statutory provision is Act 42 of the First Extraordinary Session of the 1965 General Assembly of the State of Arkansas. Relevant portions are printed in Appendix A *infra,* pages 8-13.

STATEMENT

In 1959 the Arkansas Legislature amended §75-201 of Arkansas Statutes Annotated to reduce the taxicab license fees fro $75 to $25. This interest in public transportation was also reflected in 1963, when the Legislature amended §75-206 of the Arkansas Statutes, to provide for a license fee of $15 per bus for busses operated on schedules in municipalities. Previously, the motor bus license fees were based upon a fee of 45¢ per horse power of the motor and $2.50 for each passenger seat on the bus. The reason for this drastic reduction in license fees is to be found in the emergency clause, which states as follows:

"Section 3 of Acts 1963, No. 548 read:

> 'It is hereby found that economical mass transportation for the general public is essential to the public welfare, that the owners and/or operators of motor busses on designated streets according to regular schedules, under franchise from municipalities in this state, are in dire financial circumstances, thereby jeopardizing the efficient and economical mass transportation of the public; and that an emergency therefore is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.'"
> Approved March 29, 1963.

Act 42 of the First Extraordinary Session of the 1965 Arkansas General Assembly was enacted and signed by the Governor on June 10, 1965. The Act is found in Ark. Stats. Ann., §75-201 (Supp. 1965). Under that Act, pleasure vehicles of the same size as taxicabs are charged a license fee of $19.00. However, taxicab licenses were increased to $75.00. The legislature did not change the $15.00 license fee for motor buses, which provide the only other means of public transportation in the Cities of Little Rock, North Little Rock, and Hot Springs, where petitioners operate taxicabs.

Petitioners filed a petition for declaratory judgment on July 27, 1965, in the Pulaski County Chancery Court. The petition for declaratory judgment alleged that the Act in question, together with the other licensing acts, created arbitrary and unreasonable classifications which were discriminatory and violative of the equal protection and due process

clauses of the Federal Constitution, and certain sections of the Arkansas Constitution.

The proof adduced at the hearing was that city buses had a capacity of from 25 to 40 passengers, and a weight of from 10,000 to 22,000 pounds. The proof also showed that trucks hauling rocks and other natural resources on highways, with a load limit of 34,000 to 85,000 pounds, have license fees ranging from $50 minimum to $125 maximum. Finally, the proof showed that taxicabs perform the same mass transportation functions as city buses, except that taxicab companies must provide constant service over irregular routes in all weather conditions, whereas the city buses provide service primarily on a five-day week morning and afternoon basis. In both cases, the highways of the State were utilized to a minimal degree. The Court below found the Act to be constitutional, and on appeal the Supreme Court of Arkansas affirmed.

REASONS FOR GRANTING THE WRIT

1. The matter of mass transportation in urban areas has been the source of gravest concern on local, state, and federal levels of government. In May of 1966, for example, bills were introduced in the Congress of the United States to further subsidize mass transportation companies. These bills were in amendment to the Mass Transportation Act of 1964. Congress has found that the health and welfare of urbanized society depends upon the provision of efficient, economical, and convenient transportation. The 1963 Arkansas Legislature similarly realized the problem, and realized the importance of an efficient and eco-

nomical mass transportation network for the public in urban areas.

2. There would seem to be little difference in practice or principle between buses and taxicabs, as parts of the mass public transportation system, except in that their functions supplement each other. Taxicabs and buses are both franchised by the municipalities in which they operate. Buses, for example, in Little Rock, Arkansas, operate a full service only 2½ hours each morning and afternoon, five days each week. A skeleton service is maintained the rest of the time. The bus service is only over a few of the 550 miles of streets in the City of Little Rock. Within the areas of operation, taxicabs must maintain constant unlimited service. There are periods of the day when the taxicab companies could profit by closing down, but being a public service, the companies must remain open and provide service. Nevertheless, and despite the rising cost of labor, liability insurance, vehicles and radios, taxicab companies have not yet been driven to seek subsidization, and have been able as yet to operate on a minimum fare schedule. Low fares are essential, since a fare increase, whether it be bus fares or taxicab fares, strikes hardest at the lower income workers. Low cost public transportation is not a bargain—it is an essential condition of employment.

3. The Act in question, at Sections H and I, declares the fees to be a tax for the privilege of using and operating vehicles on the public roads. We can see no reason for the discrimination between taxicabs and motor buses except an arbitrary use of legislative power. When the Legislature exercises its power to

discriminate arbitrarily in this area, then a question of grave importance to the public is presented. For this reason the writ should be granted. Settlement of the question by this Court is in the public interest, since oppressive and discriminatory classifications for taxation by the states in the field of mass transportation is likely to recur in other states.

4. In a number of cases, this Court has stated that a tax for the privilege of using highways must be related to the use made of the highways. The guiding limitation upon state power was announced in *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183 (1931), to be that a tax intended to compensate for road use "will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory." As concerns the question of burdens upon interstate commerce, this Court has readily struck down tax formulae which are capricious. See, *e.g. McCarroll, Commissioner* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940); *Sprout* v. *South Bend*, 277 U.S. 163 (1928). We can find no prior case where the Court has upheld a tax formula bearing no reasonable relationship to the privilege of road use. States may freely devise tax formulae, so long as size, weight, and other relevant factors are given some consideration within the realm of reason. *cf. Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594. But here, a tax for the privilege of the use of the state highways is exacted without displaying any regard for factors customarily relevant in making up a tax formula. Of course, a wide choice must be allowed to the states in establishing criteria for tax classifications. But irrelevant criteria which results

in a state playing favorites in the operation of its taxing system, between types of vehicles similarly situated, is an unconstitutional discrimination.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

75-201 *Fee for registration and licensing of motor vehicles.*—The fee for the registration and of all motor vehicles shall be as follows:

(A) PLEASURE VEHICLES. For all automobiles equipped with pneumatic tires, used for the transportation of persons there shall be charged and collected the following fees based upon the unladen weight of such automobiles:

. . . .

Class Two—Automobiles of 3,001 pounds to and including 4,500 pounds $19.00

(B) AUTOMOBILES FOR HIRE. For all automobiles equipped with pneumatic tires, used for transportation of persons for hire, there shall be charged and collected the following fees:

Class One—On all such vehicles with a passenger carrying capacity if five (5) passengers or less, the sum of $75.00 per annum;

Class Two—On all such vehicles of over five (5) passengers and up to and including seven (7) passengers, the sum of $85.00 per annum;

Class Three—On all such vehicles with passenger carrying capacity in excess of seven (7) passengers, the fee shall be based upon the gross weight of the vehicle at the rate of one dollar and fifty cents ($1.50) per hundred pounds, or fraction thereof, plus two dollars and fifty cents ($2.50) for each passenger carrying capacity, plus forty-five cents ($.45) per horsepower of each horsepower generated or developed by the motor propelling such vehicles.

(C) TRUCKS AND TRAILERS. For all motor trucks, trailers and semi-trailers, including pipe and pole dollies, equipped with pneumatic tires, the license fee shall be charged on the basis of gross loaded weight of the vehicle as follows:

(1) Class One—All trucks which are rated regularly and commonly as having a load capacity of one-half (½) ton or less and all trucks which are rated regularly and commonly as having a load capacity of not exceeding three-fourths (¾) ton shall be assessed a license fee of $17.00 without regard to weight;

(2) Class Two—On all such vehicles with a gross loaded weight between six thousand one (6,001) pounds and twenty thousand (20,000) pounds, the fee to be charged shall be at the rate of five dollars ($5.00) per thousand pounds of the gross loaded weight of the vehicles;

(3) Class Three—On all such vehicles with a gross uoaded weight between twenty thousand and one (20,001) pounds and forthy thousand (40,000) pounds, the fee to be charged shall be at the rate of six dollars and fifty cents ($6.50) per thousand pounds of gross loaded weight of the vehicles;

(4) Class Four—On all such vehicles with a gross weight between forty thousand and one (40,001) pounds and fifty-six thousand (56,000) pounds, the fee to be charged shall be at the rate of eight dollars and fifty cents ($8.50) per thousand pounds of the gross loaded weight of the vehicles;

(5) Class Five—On all such vehicles with a gross loaded weight between fifty-six thousand and

one (56,001) pounds and sixty thuosand (60,000) pounds, the fee to be charged shall be at the rate of nin dollars and fifty cents ($9.50) per thousand pounds of gross loaded weight of the vehicles;

(6) Class Six—On all such vehicles with a gross loaded weight between sixty thousand and one (60,001) pounds and sixty-eight thousand (68,000) pounds, the fee to be charged shall be at the rate of ten dollars and fifty cents ($10.50) per thousand pounds of gross loaded weight of the vehicles;

(7) Class Seven—On all such vehicles with a gross loaded weight between sixty-eight thousand and one (68,001) pounds and seventy-three thousand two hundred and eighty (73,280) pounds, the fee to be charged shall be at the rate of eleven dollars ($11.00) per thousand pounds of gross loaded weight of the vehicles;

Provided, any truck in Class Two, Class Three, Class Four, Class Five, Class Six, or Class Seven, above, for which the annual registration and licensing fee is one hundred dollars ($100.00) or more, may be registered and licensed for the first six (6) months of the licensing period upon application therefor and the payment of one-half of the annual license fee prescribed herein for such truck, plus an additional fee of five dollars ($5.00) to defray the administrative cost of issuing such half year license. The Commissioner of Revenues shall cause distinctive license plates to be prepared to evidence the six month registration of vehicles hereunder, and shall make such rules and regulations as he shall deem necessary to

properly carry out and enforce the provisions of this paragraph.

(8) Class Eight—SPECIAL NATURAL RESOURCES CLASSIFICATION. In order to eliminate apparent inequities in license charges for vehicles using only improved roads, and those used on the farm, in the wooded areas and off the main highway system of this State, a special classification is hereby created to provide a different and more equitable rate for those vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, and clay minerals, and ores, originating and produced in Arkansas from the point of production, harvesting or severance to the point in this State at which the same shall first undergo any processing, preparation for processing, conversion or transformation from their raw, natural or severed state. Provided, that the hauling of rock or stone or crushed rock or crushed stone, except rock or stone which is to undergo further processing into a finished or semi-finished product other than crushed rock or crushed stone, shall not be construed as "clay minerals" or "ores" under the provision of this classification. For such vehicles shall be charged and collected license fees at the following rates:

All other vehicles designated natural resources vehicles, shall be charged an annual license fee as follows:

(a) For a vehicle with two axles, a fee of three dollars ($3.00) per thousand pounds of gross loaded weight of the vehicle, with a minimum fee of $25.00 and a maximum fee of $50.00 for each such vehicle.

(b) For a vehicle with three axles, a fee of $75.00.

(c) For a vehicle with four axles, a fee of $100.00

(d) For a vehicle with five axles, a fee of $125.00.

. . . .

(H) NATURE OF FEES. Each of the fees herein authorized is declared to be a tax for the privilege of using and operating a vehicle on the public roads and highways of the State of Arkansas.

(I) DISPOSITION OF FEES. All fees, taxes, penalties and other amounts collected under the provisions of this section chall be classified as special revenues, and the net amount thereof shall be distributed as provided by the Arkansas Highway Revenue Distribution Law.

(J) PENALTY FOR VIOLATION. Any person owning a vehicle on which a fee is required to be paid under the terms of this Act who shall operate the same, or permit the same to be operated, on a public road in this State, without having paid the fee required by this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined in a sum not less than double the fee provided for, and not more than two thousand dollars ($2,000.00).

75-206. *Buses—License fees.*—Hereafter where motor buses are operated on designated streets according to regular schedules, under franchise from any municipality in this state, the owners and/or operators of such motor buses shall pay to the state an

annual motor vehicle and license fee of fifteen dollars ($15.00) for each motor bus so operated. [Acts 1939, No. 115, § 1, p. 268; 1963, No. 548, § 1, p. 1666.]

APPENDIX "B"

Opinion by Frank Holt, Justice, delivered on April 11, 1965.

The appellants, owners and operators of a fleet of taxicabs, brought this declaratory judgment proceeding seeking to invalidate a part of Act 42 of the First Extraordinary Session of 1965 [Ark. Stat. Ann. §75-201 et seq (Supp. 1965)]. The chancellor held the questioned part of the Act valid and constitutional. From that decree is this appeal.

For reversal the appellants contend that the section of the Act which raises the annual license fees for five-passenger automobiles for hire from $25.00 to $75.00 is arbitrary, discriminatory and violative of Article 2 of our State Constitution and the equal protection and due process clauses of the Fourteenth Amendment of our Federal Constitution. Appellants argue that the asserted discrimination and invalidity is apparent upon a comparison of the license fees which are: (1) $75.00 for taxicabs (five-passenger cars for hire); (2) $19.00 for other five-passenger cars (pleasure vehicles) of the same weight category as taxicabs; (3) $15.00 for city buses of much greater weight; and (4) special consideration by a reduction of the license fees for vehicles hauling natural resources. We cannot agree with this contention.

The Act specifically provides that the imposition of this tax is for the privilege of using the public roads and highways of the state and that the fees collected shall be distributed according to the Arkansas Highway Department Distribution Law. We have consistently approved a legislative classification for the purpose of the taxation of a privilege. *City of Ft. Smith* v. *Scruggs,* 70 Ark. 549, 69 S.W. 679; *State* v. *Byles,* 93 Ark. 612, 126 S.W. 94; *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S.W. 2d 1007. In *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S.W. 769, we said:

> "*** The only restriction which the law imposes on the exercise of the power [privilege tax] is that there shall not be a discrimination between persons in like situations and pursuing the same class of occupation."

And we find in City of Ft. Smith v. Scruggs, supra: "But the rule of equality only requires that the tax shall be collected impartially of all persons in similar circumstances". In the case at bar the statute applies equally and without discrimination to all persons of the classification made and thereby taxed. Also, we think a valid and reasonable distinction exists in the prescribed classifications.

In *U-Drive-Em Corporation* v. *Wiseman,* 189 Ark. 1163, 76 S.W. 2d 960, the contention was made that the tax in question "discriminates grossly between taxicab operators and in favor of buses using streets of cities and towns, and buses using State highways, and the ordinary Automobiles used for business and commercial purposes." It was there argued, also, that the Act was void as being in contravention of our

State and Federal Constitutions. We rejected these arguments saying:

> "**** The tax so imposed is substantially higher than the tax imposed upon the same automobile or same type of motor vehicle when not so used to transport persons for hire.
>
> It is strongly urged by appellants that the classification made by the State is unfair and unequal. For the purposes of argument, that proposition might be conceded, and, even if that were true, it would not be a real reason for declaring §31, or any part of it invalid. It is a principle very generally recognized by all of the courts that almost any system of taxation results in many inequalities and perhaps unfairness to particular classes, and very frequently seriously affecting individuals composing a particular class. This arises more often, not out of the law itself, but out of the peculiar conditions under which classes, or individuals, may find themselves in their manner of doing business or location, rather than out of the classification."

A classification which is based upon whether a vehicle carries passengers or freight is said to be valid. *Sproles* v. *Binford*, 286 U.S. 374 (1932). Also the state has a distinct public interest in the transportation of its citizens whether by passenger car or by motorbus, the latter being a medium of the regularly scheduled mass transportation of people. In *U-Drive-Em Corporation* v. *Wiseman, supra*, we held valid a statute which was oppressive to taxicabs and not motorbuses as being within the privilege granting power of the state.

Primarily, it is within the discretion of our legislature to determine the extent and scope of the exercise of its taxing power. The presumption and intendment favor the validity of its action. *State* v. *Byles, supra; Standard Oil Co. of Louisiana* v. *Brodie,* 153 Ark. 114, 239 S.W. 753; *Fitzgerald v. Gates,* 182 Ark. 655, 32 S.W. 2d 634.

We agree with the chancellor that the questioned portion of the Act is valid and constitutional. Affirmed.